

**Sara Lee Corporation d/b/a Rudy's Farm Company
and United Food and Commercial Workers
Union, Local 405.** Cases 10-CA-25674 and 10-
CA-25801

December 21, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On June 22, 1992, Administrative Law Judge William N. Cates issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed a brief in response to the exceptions, and a motion to strike portions of the Charging Party's brief.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the settlement agreement in Case 10-CA-25674 is reinstated and the complaint in Case 10-CA-25801 is dismissed.

¹ While the Charging Party's exceptions and brief do not conform exactly to the Board's Rules and Regulations, they are not so deficient as to warrant striking. We do, however, grant the Respondent's motion to strike eight of the nine documents attached to the Charging Party's brief because they were not presented at the hearing and they have not been shown to be newly discovered or previously unavailable. We shall not strike the ninth document, indicating that Regina Groth "was seen in the Emergency Department 9-4-91 by Dr. Spangler" because this document was previously entered into evidence as G.C. Exh. 10. Lastly, while the Respondent seeks to have stricken various statements by the Charging Party's brief writer that the Respondent denominates as "testimony" that was not presented at the hearing, we decline to strike these comments in the brief. Instead, we have not considered the portions of the Charging Party's brief that assert facts not in evidence.

² The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolution unless a clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Mary L. Bulls, Esq., for the General Counsel.
Chris Mitchell, Esq. (Constangy, Brooks & Smith), of Birmingham, Alabama, for the Company.
Joe Ellis, Business Representative, of Nashville, Tennessee, for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. I heard these cases in trial in Florence, Alabama, on May 4, 1992 (all dates are 1992 unless I indicate otherwise). On November 15, 1990, United Food & Commercial Workers, Local 405 (the Union) filed a charge in Case 10-CA-25674 against Sara Lee Corporation d/b/a Rudy's Farm Company (the Company), alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Thereafter on January 15, the Regional Director for Region 10 of the National Labor Relations Board (the Board) approved an informal settlement agreement in Case 10-CA-25674 entered into by the Company and the Union. The settlement agreement provided for the posting of a "Notice to Employees" by the Company covering allegations related to: (1) threats to reduce benefits and/or wages because of its employees' support for the Union; (2) creating the impression of surveillance of its employees' union activities; and (3) removing union materials from nonwork areas.

On February 14, the Union filed a charge in Case 10-CA-25801 alleging the Company discharged its employee Regina Groth (Groth) in violation of Section 8(a)(3) and (1) of the Act. On March 19, 1992, the Regional Director issued a complaint and notice of hearing in Case 10-CA-25801 alleging the Company wrongfully discharged Groth in violation of Section 8(a)(3) of the Act.

By an order dated March 24, the Regional Director set aside the settlement agreement in Case 10-CA-25674 and issued an order consolidating cases (10-CA-25674 and 10-CA-25801), consolidated complaint and notice of hearing (complaint). In the complaint, it is alleged the Company discharged Groth on February 12, because of her union and concerted activities, thereby violating Section 8(a)(3) and (1) of the Act. Groth's discharge is the only postsettlement allegation of unlawful conduct against the Company. The following presettlement allegations of unlawful conduct are also set forth in the complaint. It is alleged that in mid-September and mid-October 1991, Plant Operations Manager Charles Joye (Plant Manager Joye) threatened employees with a loss of benefits and wages by telling the employees negotiations would start from scratch or minimum wage if the employees selected the Union as their collective-bargaining representative. It is also alleged the Company, through its agent guard Bobby McDonald (guard McDonald) on or about October 1, 1991, in and about the vicinity of The Executive Inn Motel, Florence, Alabama, engaged in surveillance of employees' activities on behalf of the Union. It is further alleged that the Company, through its supervisor and agent, leadperson Ricky T. Berry (leadperson Berry), in or around November 19, 1991, at the Company's facility, removed union materials from employee nonwork areas and disposed of them.

The Company admits its operations are in and affect commerce, that the Board's jurisdiction is properly invoked, and that the Union is a labor organization within the meaning of the Act. The Company admits Plant Manager Joye, leadperson Berry, Supervisor Mark Gobbell (Supervisor Gobbell), and retail line Superintendent David Holloway (Superintendent Holloway) are supervisors within the meaning of Section 2(11) of the Act. The Company also admits it discharged Groth on or about February 12.

The Company denies guard McDonald and Company nurse Connie Inman (Nurse Inman) are its agents within the meaning of Section 2(13) of the Act. The Company denies all alleged wrongdoings and asserts Groth was discharged for leaving the plant without permission on February 10. The Company asserts Groth's conduct violated one of its published rules which called for immediate discharge.

All parties were afforded an opportunity to call, examine, and cross-examine witnesses and to present relevant evidence. I have considered the entire record, including briefs filed by counsel for the General Counsel and counsel for the Company. I carefully observed the demeanor of the witnesses as they testified. Based on the above, and more particularly on the findings and reasons set forth below, I will conclude the Company did not violate the Act when it discharged employee Groth on or about February 12. Inasmuch as I will conclude that the Company committed no postsettlement violations of the Act, I shall reinstate the settlement agreement and dismiss the complaint.

FINDINGS OF FACT

I. JURISDICTION

The Company is a Maryland corporation with an office and place of business located at Florence, Alabama, where it is engaged in the processing of meat products. During the calendar year preceding the issuance of the complaint herein, which is a representative period, the Company in the course and conduct of its business operations sold and shipped from its Florence, Alabama facility goods valued in excess of \$50,000 directly to customers outside the State of Alabama. It is alleged in the complaint, the parties admit, the evidence establishes, and I find, the Company is an employer engaged in the commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

It is alleged in the complaint, the parties admit, the evidence establishes, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. A BRIEF OVERVIEW

The Union commenced an organizing drive at the Company in the fall of 1991. Various employees, including Groth, openly supported the Union. The Company does not dispute that Groth was one of the more vocal and visible supporters of the Union. It is out of this union organizing drive that all allegations of violations of the Act (pre and postsettlement) arise. At the time of the trial, the Union was continuing its organizing efforts at the Company.

Under Board law, a Regional Director may set aside a settlement agreement where independent evidence of subsequent or continuing unfair labor practices reveals a breach of the agreement. See, e.g., *Aurora & East Denver Trash Disposal*, 218 NLRB 1, 9 (1975). If counsel for the General Counsel can establish postsettlement violation(s), the Regional Director's setting aside of the settlement agreement will be sustained and a remedial order for all violations found will issue. On the other hand, if counsel for the General Counsel cannot establish postsettlement violation(s), the settlement will be reinstated and the complaint dismissed without regard

to whether presettlement violations are found. Evidence underlying the settled allegations can be used as background to support the allegations to be litigated. Stated differently, in deciding whether postsettlement conduct was unlawfully motivated, counsel for the General Counsel may rely on presettlement conduct. *Copper State Rubber of Arizona*, 301 NLRB 138 (1991), and *Laborers Local 185 (Joseph's Landscaping)*, 154 NLRB 1384 fn. 1 (1965), enf'd. 389 F.2d 721 (9th Cir. 1968).

IV. PRESETTLEMENT CONDUCT

A. Plant Manager Joye's Speeches

1. The facts

Eight-year production line employee John Burns (Burns) testified he attended a company meeting in September at which Plant Manager Joye, among others, spoke.¹ Burns testified Joye spoke about the Company's gains sharing program and about the Union. Burns testified:

[Joye said] that if we joined the union that we would start from scratch and go from zero and negotiate from there. That's, you know, what we would do. We would start from scratch.

Burns also stated Joye said:

If we signed that little small card that indicates for an election . . . we would owe ourselves to the union.

Burns stated on cross-examination that he did not recall Plant Manager Joye saying anything about having been a member of or an officer in a union or that he had negotiated with this Union before.

Former employee Melissa Smith (Smith) testified she attended one of the Company-called meetings in September 1991, at which Plant Manager Joye spoke.² She testified Joye started the meeting by talking about the gains sharing program and "then went into talking about why we didn't need the Union." Smith testified:

[Joye] took the union card and put it up under a project[or], a little film screen, and told us if we signed this card we'd be signing all our rights away from the plant. And that we would start from scratch to minimum wage and would no longer have any insurance.

Smith did not recall Joye saying anything about having been a member of or an officer in this Union or that he had ever been in negotiations with this Union.

Kenneth English (English), a 9-year production employee, testified he attended an employee meeting called by the Company in early October³ and that Production Manager Joye spoke about the Company's gains sharing program and the Union. English testified:

¹ Burns estimated 20 employees attended the meeting.

² She estimated 30 to 35 employees attended the meeting.

³ English stated approximately 25 to 30 employees attended this particular meeting.

[Plant Manager Joye] had a card on a projector and was telling about if you signed the card that you'd give up all your rights.

And then he said if you went union that you would start from scratch, minimum wage, and negotiate for your wages and your benefits.

English acknowledged on cross-examination that Joye said he had once been a union member.

Three and one-half year production line employee Shelby Roland (Roland) testified she attended a Company-called meeting in September 1991, at which Plant Manager Joye, among others, spoke. Roland testified:

Well, we started out talking about the gains sharing and they explained all this. You know, what the gains sharing was for. Which was Greek to me 'cause I still don't know what we were talking about.

But then he picked up a union card and held it up and said if we signed this card that we were signing away our rights. That the Union could come in and we had no rights no more. That we couldn't vote them in or that we couldn't vote them out if they were there.

And it went on that if we did sign that and brought it in that we would go back to scratch. We would lose our insurance and our benefits and would start from scratch, is the way it was.

Roland did not recall Plant Manager Joye saying he had been in a union or that he had negotiated with a union before.

Employee Groth testified that at the Company-conducted meeting she attended in early October 1991, Plant Manager Joye spoke about the gains sharing plan and told the group that if they signed a union card, they would be signing away all of their rights. She testified:

He said he had once belonged to a union and that he didn't benefit from it. He said also if we signed a union card that we'd be starting from scratch.

The Company presented former employee Joyce Kennedy (Kennedy) who testified she attended one of the employee meetings Plant Manager Joye conducted in October 1991.⁴ She testified:

He was trying to explain to everybody that if they signed something he wanted to be sure they knew what they were signing. And he showed us a card, the little card, that they were trying to get everybody to sign.

And he simply stated the fact that in his years of experience with unions they didn't follow up with their promises. And he wanted everybody to know what they were signing before they signed it.

Kennedy could not recall what, if anything, Plant Manager Joye said happened in negotiations explaining it "had been several months" since the meeting. She, however, added Joye "wanted everybody to know that there was a possibility of starting from the bottom up if we had a union." She was not sure if Joye used the word "scratch" but said she never

heard him say that if the employees signed union cards, they would lose their insurance.

Human Resources Manager Patsy Burney (Burney) testified she attended every meeting (eight) that Plant Manager Joye held with the employees in the fall of 1991. She said Joye spoke about the gains sharing program at the Company. She testified:

We had started noticing some union cards in the plant, and Mr. Joye had made an overhead of one so that he could tell the employees what they were so it wouldn't be a surprise or shock to anybody to see one.

He did go over exactly what was stated on the card. He told them that he wanted them just to be aware of what their rights were.

Burney further testified:

[Joye said] that he had worked with a union; he had been in a union, and he knew what the union—what their thinking was because he had actually negotiated union contracts himself.

Burney first testified Joye used the term "scratch" or "starting from scratch" and that "he said . . . there was nothing guaranteed; that they would start and it would go from there."⁵

Plant Manager Joye testified he at one time (some 40 years ago) belonged to and served as a steward in a union. He said that when union activity commenced at the Company in the fall of 1991, he conducted a series of group meetings with employees. He said he spoke about the Company's gains sharing plan and the Union. Joye said he not only talked about union signature cards but also about the negotiating process. He testified:

I had the [union] card that I had on a screen and I just read it off to them. I says, "I want y'all to be aware of what you're signing, you know. When you sign this card, you're signing your rights to speak for yourself away. You're turning all your bargaining authority over to an outsider."

I says, "When we do this, we start at ground zero; everything becomes negotiable. You can end up with more; you can end up with less."

Joye could not recall telling employees that if they signed a union card, they would lose their insurance. He specifically said he did not use the word "scratch" in talking with the employees because he had never heard that word before it was mentioned at the trial. Joye could not recall mentioning minimum wage in his meetings with the employees.

2. Credibility resolutions

I am persuaded, as testified to by employees Burns, Smith, English, Roland, and Groth, that Plant Manager Joye stated negotiations would start from scratch. In that regard, I note Human Resources Manager Burney also testified Joye used the term "scratch" in talking with the employees. Even when she indicated he used the term "ground zero," she did

⁴She testified the room was "overflowing" but that it was "a small room." She could not estimate how many employees were present.

⁵When asked further about whether Joye used the term "scratch" or some other term, Burney testified Plant Manager Joye used the term "ground zero."

not disavow or move away from her testimony that he also used the term "scratch" in describing the negotiating process with the employees. I am fully convinced Joye was not completely candid when he testified he had never, before the trial herein, heard the term "scratch" used. I am also persuaded Plant Manager Joye told employees negotiations would start at minimum wage and they would no longer have their insurance coverage and other benefits but would have to negotiate for them. Plant Manager Joye's testimony that he could not recall mentioning minimum wage or that employees would lose their insurance was unconvincing.

B. Guard McDonald's Actions

1. The facts

Employee English testified he became involved in the union campaign at the Company in approximately October 1991. He stated that in early October 1991, he attended a union meeting at The Executive Inn Motel in downtown Florence, Alabama. English said the meeting was scheduled to start at approximately 3:30 p.m. and that he along with Robert English, Ronnie Smith, Dave Lauro, Jim Berry, and Keith Collins arrived early and went to a restaurant directly across the street from the motel. He said they sat at a window table and that one of them observed guard McDonald drive by. According to English, guard McDonald drove in front of the motel and restaurant four or five times. English testified McDonald "would ride past the restaurant . . . go up past the [traffic] light up the hill to another parking lot and turn around and come back." English said guard McDonald "drove by when we was going in across the street to meet the union people." English said he called out to guard McDonald but that McDonald "acted" like he didn't see him.

On cross-examination, English said he understood guard McDonald worked for a company known as Certified Contractors and that McDonald also owned a small engine repair business in Florence, Alabama.

Guard McDonald testified he is currently employed by Certified Contractors of Sheffield, Alabama, and has been for some 12 years. He said he is the security guard supervisor and on-site supervisor for all temporary employees at the Company. He said Certified Contractors' agreement with the Company calls for it to supply all guards and temporary employees needed by the Company. McDonald said his on-site supervision of the temporary employees as well as his overall responsibility for the security guards at the Company necessitates his visiting the plant at least once daily.

Guard McDonald testified that Certified Contractors has contractual arrangements with six or more additional companies in the Florence, Alabama, area and that he also visits each of those facilities on a daily basis. McDonald said he operates a small engine repair business in Florence, Alabama, that is located approximately three-fourths of a mile from the Company's facilities. McDonald said that in operating his small engine repair business he purchases parts from a business operated by Joe Ellison on West Limestone Street "two blocks over" from the downtown Executive Inn Motel. Guard McDonald said he does a lot of business with Ellison on a daily business.

Guard McDonald testified, without contradiction, that the Executive Inn motel is located 1-1/2 blocks from the Compa-

ny's facility on Limestone Street and that the only way one can get to the Company's facility is by way of the Executive Inn Motel—as well as by the way of the restaurant located directly across the street from the motel.

Guard McDonald testified that one morning as he stopped to "pick up . . . paper work" at the Company's guard shack, employee David Lauro told him "The next time I catch you spying on one of our meetings, I'm gonna whip yo' ass." Guard McDonald said he told Lauro to get out of the guard shack, that he was threatening him. McDonald said that was the first he had heard of any meetings whatsoever. McDonald said he was not aware of any union meetings being held at any time.

McDonald acknowledged he knew, but said he never at any time saw Kenneth English, Robert English, Ronnie Smith, Keith Collins, David Lauro, and/or Michael Berry at or near the Executive Inn Motel or at the restaurant located across the street. McDonald testified that each of his trips to and from the Company resulted from his supervisory functions and in the operation of his small engine repair business or in servicing other clients of Certified Contractors.

2. Credibility resolutions

Guard McDonald impressed me as an honest witness involved in a multitude of job duties and business operations. I credit his testimony.

C. Leadperson Berry's Actions

1. The facts

Groth testified that in early November 1991, she distributed prounion literature in the breakroom at the plant. She testified leadperson Berry was in the breakroom at the time. Groth testified:

Well, I was going along the tables and I was putting down our literature on each table,⁶ and I looked up and noticed some response from some of the people in the breakroom. They were smiling, and some of them were laughing. And I turned around and looked and Ricky T. Berry was directly behind me removing each paper I was putting down on the tables.

I stopped and went and sat down at one of the tables to see what he was gonna do next 'cause I didn't know if he was gonna take up anymore papers. And he took what he had and threw them in the trash and walked out the door.

Groth said she did not say anything to leadperson Berry. She testified there was antiunion literature in the breakroom at the time and that the antiunion materials were allowed to remain.

Leadperson Berry did not testify.

2. Credibility resolutions

Groth was a very active supporter of the Union. She admittedly prepared various handbills that were distributed at the Company. Thus it is very believable she placed prounion literature in the breakroom as she testified. Accordingly, I

⁶Groth testified there were approximately 30 to 50 tables in the breakroom.

credit Groth's undisputed testimony that she placed prounion literature in the breakroom and that leadperson Berry removed and trashed it.

V. THE POSTSETTLEMENT CONDUCT

The complaint alleges but one postsettlement unfair labor practice, the termination of Regina Groth.

A. *The Discharge of Groth*

1. Allegations

It is alleged at paragraphs 13, 14, and 17 of the complaint that the Company on or about February 12, discharged and thereafter failed and refused to reinstate its employee Groth because of her membership in and activities on behalf of the Union and because she engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection.

2. The facts

It is not disputed that Groth was discharged on or about February 12. At the time of her discharge, she worked for Supervisor Gobbell. Groth worked various jobs—meat cutting, boxing, packing, assembling—in her 5 years at the Company.

Groth testified she immediately became involved in the Union's organizing campaign once it started in October 1991. Groth said she handbilled at the entrance to the plant, distributed union cards, visited employees' homes on behalf of the Union, telephoned employees about joining the Union, and created various prounion slogans and cartoons. Groth specifically recalled handbilling at the plant entrance in November 1991 and January 1992. She said that when she and others handbilled in November 1991, that leadperson Berry accepted a prounion handbill from Union Representative Joe Ellis and then tore it up. She said leadperson Berry came back through the entrance gate a few minutes later in a different car and again accepted prounion literature which he proceeded to destroy.

Groth testified she prepared a cartoon type flyer that her fellow workers distributed at the plant in October 1991. Groth's cartoon was captioned "Us older hands we are so wore out no one else will ever hire us" beneath which were three women's heads. Under the women's heads was "Let's bully the union people" with four cartoon characters, one of which was saying, "Yea, tear up those union papers, momma." The flyer also reflected the following comments, "Our rights went out with Martin Luther King" beneath which were drawings of a man and woman. Groth said that after the above-described cartoon was distributed at the plant, Manufacturing Manager John Gleaves called the employees in Groth's department together and told them the Company did not approve of Groth's cartoon, "that it depicted racial discrimination and age discrimination."

Groth testified that one morning in early November 1991, she stood in front of the breakroom at the plant with a sign that read "Treat Us Like People, Not Pigs" and that while she was doing so, leadperson Berry walked by and told her to "fuck off."

As noted elsewhere in this decision, Groth placed prounion literature in the employees' breakroom which leadperson Berry removed and destroyed.

Groth's testimony regarding Plant Manager Joye's comments made at the company-called group meeting she attended are set forth elsewhere in this decision and will not be repeated here.

Groth prepared a one-page written document critical of the Company which she posted in the women's restroom at the plant in early October 1991, after which she was called to a meeting with Plant Manager Joye. At the meeting Joye told Groth some of the employees had brought it to his attention that she had posted the notice.

Groth testified that shortly before she was discharged in February, she prepared and distributed the following one-page letter at the plant:

FELLOW EMPLOYEES

Many of the employees at Rudy's know that working conditions need to be improved. Some have already expressed that desire by supporting the Union. Very soon the government will be posting a paper at Rudys' in regards to some of the Company untruths that they have made to the employees. One misrepresentation that management has made is what your rights are when you sign a Union Card. It *does not* fall into the hands of management, because the Federal Government *protects* your privacy in doing so. We are all protected by the First Amendment when it comes to Freedom of Speech, Freedom of Press and Freedom of Expression. Those very rights come from our "Bill of Rights." Every employee at Rudys' deserves to be informed of conditions that affect their jobs even if they are full-time or temporary workers. The Company has admitted to some of the charges that they have committed. The Company has been made to sign an official paper and will be required by law to be posted throughout the whole plant. No person will be allowed to remove this paper and will be posted for 60 days.

As a result of this action by a few employees, you will begin to see some improvements. Of course, this effort has been made possible by a few caring and concerned workers at Rudys' that had the courage to come forward and just say "HEY, WE'RE TIRED OF BEING LIED TO AND MISTREATED AND WE WANT SOME GOOD CHANGES." Many of you feel you have no human rights, but you do. Don't sell yourselves short. Management can't take away your rights, they can only suppress them. There is a committee at Rudys' for this Union that believe in their rights and believe in yours. We are there for you not against you and we are there for the improvements that are needed at Rudys'. We the committee for this Union are not allowed to mislead you or lie to you, but rather to inform you. The Government that backs this Union will not back liars, only people who pursue their rights. You too can make a difference just by signing a Union Card. You are somebody who wants to better themselves by making improvements in their workplace and there is nothing wrong with that. Allow yourselves the time to count for something RIGHT. Give yourselves the op-

portunity to come to our next meeting. If it's not what you want for yourself then you are welcome to leave and we'll still respect your decision.

Please come and allow us the right to be heard.

THANK YOU

Groth testified that before she and others distributed the letter at the plant, she made an appointment with Plant Manager Joye⁷ to ascertain if the union committee could post her letter on the employee bulletin board at the plant. Plant Manager Joye told Groth he would have to consult the Company's attorneys and get back with her. Groth said Plant Manager Joye never gave her an answer on whether she could post her letter on the bulletin board or not.⁸

Groth was absent from work on January 28, because her daughter was ill. She said that when she returned to work the next day, she gave Supervisor David Wallace a doctor's excuse concerning her daughter's sickness which he accepted. Groth testified that later that same day, Supervisor Wallace told her she would need to bring in an original doctor's excuse that Human Resources Manager Burney asked him to tell her the first one was not acceptable. Groth said she obtained a "To Whom it May Concern" statement from the Director of Emergency Medical Services at the Helen Keller Hospital in Sheffield, Alabama, and presented it to Supervisor Wallace. She testified that prior to that incident, she had not been required to bring an original doctor's statement to the Company.

Groth testified she reported for work as usual on February 10. She said that shortly after reporting for work, she became ill and informed Supervisor Gobbell that at the morning break (8:15 a.m.), she was going to go to the nurse's station. At approximately 8:15 a.m., Groth reported to Nurse Connie Inman at the nurse's station. She told Nurse Inman she was experiencing diarrhea and vomiting. According to Groth, Nurse Inman took her name, offered her some ginger ale, and suggested she lie down for awhile. Groth testified Nurse Inman shortly thereafter received a telephone call from Supervisor Gobbell and that Inman told Gobbell to "wait a few minutes" and see if Groth "got to feeling better." Groth testified Inman thereafter asked if she was feeling any better. Groth told Inman she was not, that she might need to see a doctor. According to Groth, Nurse Inman said "If you do, be sure to bring a doctor's excuse or you'll be counted as unexcused absence." Groth said she began to feel worse and left the nurse's station to go to an upstairs bathroom where she vomited. Groth said that as she was on her way back to the nurse's station, Nurse Inman met her at the stairs and asked if she was feeling any better. Groth told Inman she was not. The two of them returned to Nurse Inman's office and Groth asked Nurse Inman if she thought a doctor would give her a shot. Nurse Inman told Groth probably not, that a doctor would simply recommend fluids and bed rest.

⁷Human Resources Manager Burney and Manufacturing Manager Gleaves also attended the meeting with Groth.

⁸Company counsel at trial stated there is no dispute that Groth was an open and avowed union supporter who made no effort to conceal her support for the Union and that certain of the documents she prepared and/or distributed supporting the Union were served on company officials.

Groth testified that shortly thereafter, Nurse Inman paged Supervisor Gobbell and that Gobbell returned her call. Groth heard Inman told Gobbell, "Well, she thought she'd get to feeling better but she wasn't, so she's gonna go ahead and go on to the doctor." Groth said she was sitting in the treatment room but the door was open when she overheard the above conversation.

Groth testified Safety Coordinator Bush came to the nurse's station at about the time she was leaving⁹ and that Nurse Inman was on the telephone at the time. Groth said that as she left the nurse's station she stated to Nurse Inman that she was going to go on to see a doctor.

Groth said she left the nurse's station at around 9:30 a.m. to visit a doctor.¹⁰

Groth did not report for work on February 11. She said she was being treated for a "spastic colon." Groth said she called the Company early on the 11th and first spoke with one of the guards. The guard told her she would need to call back at 8 o'clock and speak with Human Resources Manager Burney. Groth testified that around 8 a.m., she telephoned Nurse Inman and told her about her illness and, according to Groth, Nurse Inman told her to be sure and call Human Resources Manager Burney. Groth said she telephoned Burney who simply stated she hoped Groth got to feeling better.

Groth reported for work on February 12, but was detained for a brief moment at the guard shack until the guard on duty checked with Supervisor Gobbell. After the guard checked with Gobbell, Groth was permitted to enter the plant. Groth clocked in and then gave Supervisor Gobbell a statement from her doctor.¹¹ Supervisor Gobbell told Groth they needed to go to the office. Groth said she and Supervisor Gobbell went to Superintendent Holloway's office where Gobbell showed her a copy of the Company's Rule Book in which he had highlighted Rule Number 7. Supervisor Gobbell told Groth she had violated the highlighted rule.¹² Groth said she told them her version of what had happened and asked if she could give a written statement. When told she could, Groth wrote out her version, signed, and dated it. Supervisor Holloway told Groth the Company could not allow her to report for work that she would need to make an appointment to see Plant Manager Joye. Groth immediately left the plant.

Groth testified that when she got home, she telephoned Plant Manager Joye and arranged to meet with him at 9 a.m. the next morning (February 13).

Groth met with Plant Manager Joye, Human Resources Manager Burney, and Manufacturing Manager Gleaves the next morning in Joye's office. Groth first provided Plant Manager Joye with another written statement of what had happened. Joye commented that he had enough statements from her. Joye told Groth she had broken a plant rule, that

⁹Groth said that in addition to Nurse Inman and Safety Coordinator Bush, employee Joyce Kennedy was also in the nurse's station.

¹⁰Groth denied telling Nurse Inman that she was going to go back to the line and try working again or that Nurse Inman took her temperature.

¹¹The doctor's report Groth provided Supervisor Gobbell was a doctor's statement/diagnosis form.

¹²The rule in question—Rule number 7—in the Company's "Employee Handbook" reads, "Committing any of the following offenses may lead to immediate discharge." Number 7 "leaving work before the end of the work day or not ready to go to work at the start of the work day without notifying the supervisor."

she was terminated, and, "that's all they had to say about it."

It is undisputed that Groth was discharged assertedly for leaving work without her supervisor's permission.

Groth testified she had left work before to visit a doctor prior to the incident for which she was discharged. She testified that in September 1991, she left work to visit a doctor and that nothing was said to her nor was she disciplined when she returned to work. Groth described the September 1991 incident as follows:

I had the same symptoms. I was throwing up; I had diarrhea that day. I went to see Connie [Nurse Inman] and she excused me to go on. I was sick; I told her I had to leave 'cause I was sick. She said go ahead and go on.

I didn't have to call anybody or contact anybody. She just told me to go on. She did not even tell me to contact my supervisor or anything.

Groth testified she had never been told she had to speak directly with and/or obtain permission from her supervisor before she could leave the plant.

Groth said she had only been disciplined once before she was discharged and that was for clocking in one minute late. Groth, however, said she had submitted some 20 safety slogans to the Company and had been allowed to park in the Company's reserved parking lot as a reward for submitting the safety slogans.

On cross-examination, Groth acknowledged signing for and receiving a copy of the Employees Handbook containing the rules of the Company including Rule 7 pertaining to leaving work without a supervisor's permission. She also acknowledged on cross-examination that she did not present the Company an original copy of a doctor's statement for her visit on February 10, as justification for her absence on that date, but rather that she presented the Company a one-page "Certificate to Return to Work" signed by a physician. Groth acknowledged she provided the Company original doctor's certificates for her absences on December 7, 1989, February 1, March 21, June 13, June 20, August 8, and August 13, 1990, and January 7, June 12, July 1, and September (no specific date provided) 1991.¹³

Supervisor Gobbell, who has been with the Company 10 years, was Groth's supervisor at the time of her discharge.

Supervisor Gobbell testified Groth told him at around 8 a.m. on February 10, 1992, that she was not feeling well, that she had a virus, and that she wanted to see the nurse. He said that at approximately 8:15, Groth left her work line in route to visit the nurse. He said he did not give her per-

mission to leave the plant nor did he see or speak with her again that day.

Supervisor Gobbell testified he telephoned the nurse's station at around 9 a.m. to check on Groth because he was short employees on the production lines he was responsible for. Gobbell testified Nurse Inman told him Groth would probably be back on the line in a little while. He said Nurse Inman made no mention of Groth going to see a doctor.

Supervisor Gobbell testified he called the nurse's station again about 9:45 a.m. to check on Groth and was told by Nurse Inman Groth "was on her way back up there on the line." Gobbell said Groth did not return to the line, so he had an employee check the restroom, lunchroom, and locker room but Groth was not to be found.

Supervisor Gobbell testified he thereafter spoke with Superintendent Holloway and Nurse Inman and then prepared a statement about the events of the morning related to Groth.

Supervisor Gobbell testified he met with Groth on February 12, in Superintendent Holloway's office. Gobbell testified:

Well, I asked Regina first why she left without notifying me. She said that the nurse said she could leave. I said the nurse hadn't got the authority to let you leave. And I showed her the rulebook where it said the supervisor has the authority to let you leave or not.

Supervisor Gobbell testified Groth claimed Nurse Inman had spoken with him on the telephone and that Nurse Inman had told her (Groth) it was all right for her to leave to go to a doctor. Gobbell said he did not give any such permission to Nurse Inman¹⁴ and added Nurse Inman never mentioned that Groth was leaving the plant.

Supervisor Gobbell said Groth left Superintendent Holloway's office asking "What now? A hearing?"

Supervisor Gobbell acknowledged on cross-examination he had not encountered any problems with Groth leaving work without permission prior to February 10, and he stated he had no doubt Groth was ill at the time she left her work line on February 10.

Connie Inman has been the plant nurse since July 1991. She sees employees who, for whatever reason, are not feeling well or have sustained an on-the-job injury. Nurse Inman stated that when an employee was sick enough to visit the nurse's station it generally occurred during working time and the employee's supervisor would be aware of the employee's presence at the nurse's station. Inman said it was Company policy that when an employee needed to see a doctor the employee's supervisor had to be notified and approval obtained from the supervisor before the employee could leave the plant. Nurse Inman said she knew of no instance where an employee had left the plant during the employee's work shift without the employee's supervisor's permission.

Nurse Inman testified that on February 10, she received a call from Supervisor Gobbell that employee Groth was not feeling well and would be coming to the nurse's station at around 8:15 a.m. that morning. Inman testified Groth came to the nurse's station "complaining of nausea and diarrhea."

¹³ On redirect examination, Groth identified an Edna Coffee Memorial Hospital, Florence, Alabama, document which she asserts reflects she was seen by a Dr. Spangler in the emergency department of that hospital on September 4, 1991; however, no symptoms are checked on the one-page document nor is the document signed or stamped by anyone other than Groth. The document simply provides instructions to be followed in treating any symptoms checked with a recommendation that the patient see a doctor if there is no improvement. Groth asserts she provided a copy of this document to the Company on September 4, 1991. The parties, however, stipulated no such document was contained in Groth's personnel file at the Company.

¹⁴ Supervisor Gobbell testified he had the authority to authorize the nurse to tell someone they could leave the plant but he could not recall ever having done so and he specifically stated he did not do so in employee Groth's case.

She said Groth asked for privacy so the two of them went into a treatment room that joined her office where she gave her some medication for diarrhea and nausea. Inman testified Groth remained in the treatment room for approximately 20 to 25 minutes and then left to go upstairs to the restroom. Groth returned from the restroom and told Inman she was "gonna go to the doctor and get a shot." Inman told Groth a doctor would not give her a shot unless she was experiencing extreme diarrhea and vomiting. Inman said she told Groth that if she did leave, she (Groth) would have to tell Supervisor Gobbell. Groth asked why and Inman told her it would be an unexcused absence if she did not have permission to leave. Inman said she took Groth's temperature and found it to be normal. According to Inman, Groth remained at the nurse's station approximately 20 more minutes and then announced as she was leaving the area "I'm going back on the line and try it again." Nurse Inman said her telephone rang and as she answered it she asked Groth, "You're gonna try it again?" Nurse Inman said Groth nodded yes and left the nurse's station.

Nurse Inman stated that shortly after Groth left, she received a telephone call from Supervisor Gobbell asking about Groth. Inman told Gobbell Groth was on her way back to her work line. Nurse Inman said that about 10 or 15 minutes later Supervisor Gobbell again called and said Groth had not returned to the line. Inman told Gobbell Groth was not at the nurse's station and suggested he check with Human Resources Manager Burney's office to see if Groth had gone there and also suggested he check the restroom in that Groth might have taken ill again.

Nurse Inman testified she received a telephone call the following day, February 11, from Groth who told her she had visited her family doctor, that she had a "spastic colon," and was on medication. Inman told Groth she should inform Human Resources Manager Burney of her status.

The following day, February 12, Nurse Inman received another call from Groth in which Groth wanted to know when she had left work for a doctor's visit the year before.¹⁵ Inman told Groth she did not have that information in her office, that it would be in Human Resources Manager Burney's office.

Former employee Joyce Kennedy (Kennedy) testified she was on light duty on February 10, and as a result was in the nurse's station on that date. She testified Groth came to the nurse's station and asked to speak privately with the nurse. Kennedy said Groth and Nurse Inman went into an examination room, closed the door, and remained there several minutes. Thereafter, Nurse Inman came out but, according to Kennedy, Groth remained in the examining room for some time. Kennedy said Nurse Inman checked on Groth a couple of times before Groth went upstairs to the restroom. Kennedy said Nurse Inman checked on Groth once while she was in the restroom and that Groth thereafter returned to the nurse's station. Kennedy said Groth told Nurse Inman, "I think I just need to go see my doctor and maybe get a shot." Kennedy

¹⁵ Nurse Inman's medical logs reflect Groth visited the nurses station twice in September 1991. The first visit was on September 4, at 8:40 a.m. Groth was diagnosed as having a cold and was given a cold tablet and returned to work. Groth's second visit was on September 12, at 1:30 p.m. Groth was diagnosed as having a splinter which was removed from her finger. Groth's finger was treated with peroxide and she returned to work.

said Nurse Inman told Groth she doubted a doctor would give her a shot unless her symptoms were worse than she exhibited at the time. Kennedy stated Groth complained of having chills and that Nurse Inman took her temperature and announced it was normal. Kennedy stated that after a while, Groth left the area and that Nurse Inman asked her if she was going to go back on the production line. Kennedy said she received a call and did not hear Groth's answer. Kennedy said Nurse Inman had told Groth earlier that if she left the plant to make sure she told Supervisor Gobbell.

Nurse Inman is supervised by Safety Coordinator John Bush. Bush testified he checks with Nurse Inman on a daily basis. He said he was in the nurse's station at around 9:30 a.m. on February 10. He said Nurse Inman, along with then employee Kennedy and Groth, were present at the time of his visit. He said he overheard Nurse Inman ask Groth if she was "gonna go back and try it?"¹⁶ Bush said Groth exited the office and started in the direction of the plant.

Human Resources Manager Burney testified she conducted an investigation¹⁷ of Groth's February 10 absence from the plant. Burney said her investigation disclosed that Groth left the plant without telling her supervisor which Burney said was a violation of one of the Company's rules that called for immediate discharge.

Burney testified she was present when Plant Manager Joye, Manufacturing Manager Gleaves, and Groth met in Joye's office on February 12. Burney testified:

Mr. Joye just simply told Ms. Groth that she was terminated for violation of the rule. That we had done a thorough investigation and had come to the conclusion she had violated the rule, and that she was being terminated for that reason.

Burney testified she had been human resources manager since 1976, and that she was not aware of any employee leaving the plant without permission and not terminated.

Human Resources Manager Burney testified that a review of Groth's absentee records showed no absences in the month of September 1991. The closest date to September that Groth was absence from work was July 29, 1991. Her absence on that occasion was to attend a funeral.

Plant Manager Joye said he made the final decision to terminate Groth. He said that at the time he made the decision, he was fully aware that Groth actively supported the Union but he said her activities on behalf of the Union had nothing to do with her termination. Joye said Groth was terminated simply because she walked off the job without obtaining permission from her supervisor. He said such conduct violated one of the Company's rules that calls for immediate discharge. Joye said he did not review Groth's personnel file but rather made his decision based upon Human Resources Manager Burney's investigation. Plant Manager Joye testified he had terminated other employees pursuant to the Company's rules that called for immediate discharge. He said two employees had been terminated for fighting and one for violating a different rule but he could not remember the details of the other termination.

¹⁶ Bush said he heard no conversation about Groth leaving to go to a doctor.

¹⁷ Burney testified she interviewed Nurse Inman, Safety Coordinator Bush, Supervisor Gobbell, and former employee Kennedy.

3. Credibility resolutions

A number of the facts related to Groth are not disputed and will be discussed in the analysis and conclusions section of this decision. There are, however, some disputed facts that must be resolved in deciding the merits of Groth's discharge.

A number of factors in addition to demeanor convinces me Groth's testimony must be examined very closely where it is contradicted by the testimony of others. First, I note Groth testified that when she was absent from work in January 1992 due to her daughter's illness that she was required to provide the Company an original doctor's statement and that she had never been required to do so before. The evidence, outlined in the factual part of this decision, reflects Groth presented the Company with original doctor's statements starting from December 7, 1989, and going through mid to late 1991. Groth's testimony that she left the plant ill in September 1991, after visiting the nurse's station and obtaining Nurse Inman's permission does not appear to be reliable in that the Company's medical records reflect only two visits by Groth to the nurse's station in September 1991. In one of her visits, Groth complained of having a cold and was given a cold tablet and returned to work. The second such visit in September 1991, was to have a splinter removed from her finger. Again the records reflect Groth returned to work. Additionally, I note the Company's attendance records show no absences for Groth in the month of September 1991. The document Groth contends she gave the Company that evidenced her visit to a doctor on September 4, 1991, was not signed or stamped by any attending physician and none of the items to be checked on the form was checked. Although perhaps not extremely critical to this case except in resolving credibility, Groth testified Nurse Inman did not take her temperature on February 10. Nurse Inman testified, and her testimony was corroborated by that of former employee Kennedy, that she did take Groth's temperature. I find it reasonable to conclude that a health care person will take a patient's temperature as a routine part of any medical examination. In light of the above, as well as my observation of Nurse Inman as she testified, I credit Inman's testimony that when Groth left the nurse's station she told Inman, "I'm going back on the line and try it again." I credit Nurse Inman's testimony that on further inquiry Groth nodded she was going to do just that. Nurse Inman's testimony in that respect was in part corroborated by Safety Coordinator Bush's and then employee Kennedy's testimony. Nurse Inman's testimony is also corroborated in part by Supervisor Gobbell's testimony that Inman told him Groth had left the nurse's station and was returning to the production line. I specifically credit Nurse Inman's and Supervisor Gobbell's testimony that they never at any time gave Groth permission to leave the Company on February 10.

4. The *Wright Line* test

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Board set forth its causation test for cases alleging violations of the Act that turn on employer motive. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision.

Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. The classic elements commonly required to make out a prima facie case of union-discriminatory motivation under Section 8(a)(3) of the Act are union activity, employer knowledge, timing, and employer animus.

5. Analysis and conclusions

I shall, consistent with Board policy, consider the presettlement conduct of the Company only as background evidence in appraising the Company's motives and objectives.

That Groth was actively involved with the Union is not disputed. She handbilled for the Union, drew prounion cartoons and posters, solicited fellow workers to support the Union, and even sought management's permission to post certain prounion literature in the plant. The Company acknowledges being aware of Groth's union activities at and before the time of her discharge. Groth's discharge came shortly after she had prepared and distributed certain prounion literature at the Company. The Company's animus toward its employees' union activities is demonstrated by Plant Manager Joye's comments about loss of benefits and wages if the employees selected the Union as their collective-bargaining representative and by leadperson Berry's removal of union materials from the employees' breakroom and destroying such materials while allowing antiunion (pro-Company) materials to remain in the same area. Thus, I am persuaded counsel for the General Counsel established a strong prima facie case.

I am, however, persuaded the Company demonstrated it would have taken the same action it did even in the absence of any protected conduct on Groth's part. Although it is not disputed that Groth was sick on the day in question (February 10)¹⁸ or that she had permission to visit the nurse's station on that date; the credited testimony establishes she left the plant without permission. No credible evidence was presented that any employee had ever left the plant in the past without permission without being discharged or disciplined.¹⁹ Groth's contention that she left the plant in September 1991, with only Nurse Inman's permission was simply not borne out by any credible testimony or evidence. The Company's rules call for immediate discharge for certain offenses, one of which involves employees leaving work without permission from their supervisor. There is no question but that Groth was aware of the Company's rules inasmuch as she had signed for a copy. Plant Manager Joye testified others had been discharged for first time offenses pursuant to the Company's rules. Thus, I am persuaded the Company did not seize upon Groth's unauthorized absence to discharge her. I'm persuaded the Company demonstrated it would have

¹⁸The extent of her illness may be indirectly in dispute but I need not reach that issue in order to resolve the merits of her discharge.

¹⁹Employees Smith and Roland testified about leaving the plant ill; however, in each of the instances they testified about, they were aware at the time they left that their supervisors knew or would specifically be informed of their absence. In the instant case, Groth was specifically told by Nurse Inman to tell her supervisor if she left the plant. This Groth failed to do.

discharged Groth even in the absence of any protected conduct on her part.²⁰

CONCLUSIONS OF LAW

1. Sara Lee Corporation d/b/a Rudy's Farm Company is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food & Commercial Workers, Local 405 is a labor organization within the meaning of Section 2(5) of the Act.

²⁰It is not for me to address the issue of whether the discipline given Groth was harsh. It is my duty to determine if the Company's actions violated the Act, and, as set forth above, I have concluded its actions related to Groth did not.

3. The Company did not violate Section 8(a)(3) and (1) of the Act when on or about February 12, 1992, it discharged its employee Regina Groth.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended²¹

ORDER

The informal settlement agreement entered into between the Company and the Union, which settlement agreement was approved by the Regional Director for Region 10 of the Board on January 15, 1992, is hereby reinstated and the complaint herein is dismissed in its entirety.

²¹If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.